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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 219

KIMBLE GLASS COMPANY, A Corporation, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below (Pet. App. 1) is reported at 230 F. 2d 484. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 305a-328a, 259a) are reported at 113 NLRB 577.[1]

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[1] The record consist of the appendices to the briefs in the court below. References to petitioner's appendix bear the suffix "a"; references to the Board's appendix bear the suffix "b."

JURISDICTION

The judgment of the court below was entered on February 29, 1956 (Pet. App. 1). The petition for rehearing was denied without opinion on April 3, 1956 (Pet. App. 1). The petition for a writ of certiorari was filed on June 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition, pp. 5-7.

QUESTION PRESENTED

In the course of an organizational campaign between two unions, petitioner, assertedly because of threats of violence and work stoppages by representatives and members of the incumbent union, prohibited the wearing of all union badges in its plant and discharged 21 employees of the rival union who violated the rule. The question presented is whether the Board properly concluded, in the circumstances of this case, that promulgation and enforcement of this rule violated Sections 8(a)(1) and (3) of the Act.

STATEMENT

A. *The Board's findings of fact:* Petitioner manufactures glass products at its Columbus, Ohio plant. During the summer of 1953, petitioner's 1500 employees were represented by the Glass Bottle Blowers Association, AFL (referred to here as "GBBA") under a collective bargaining contract which contained

union-security and no-strike provisions (R. 306a; 1799; 35b).

In July 1953, about 5 weeks before this agreement was due to expire, the International Union of Electrical, Radio and Machine Workers, CIO (herein referred to as "IUE,") began a campaign to organize the Company's employees (R. 306a). The opening of this campaign made GBBA officials and supporters apprehensive that GBBA would lose its status as the exclusive representative (R. 262a; 124b, 125b). Bertie Cupp, an officer of the GBBA female local, told Plant Manager Gatti that GBBA supporters were "not going to stand for another union getting in there and attempting to organize from under [them]" (R. 262a; 239a).

Beginning August 3, several employees favoring IUE started to wear badges, 4 inches in diameter, which bore the legend "IUE-CIO" (R. 306a; 35a-36a). At that time, there was no plant rule against wearing union insignia, and it had been the practice for members of the GBBA to wear the union insignia of their organization (R. 306a; 67a).

Shortly thereafter, on August 6, GBBA official, William Lewis, complained to Plant Manager Gatti that the wearing of the rival IUE buttons was causing tension in the plant that could lead to violence, and that the Company "would be faced with a walkout of his people who would refuse to work with people wearing these large CIO badges" (R. 307a; 56a-58a, 96a, 177a-179a). Gatti stated that he would investigate the matter (R. 307a; 58a).[2]

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[2] At this time Gatti, who was in constant and close touch with plant affairs (R. 63a-66a), was not aware of any tension and un-

Subsequently Lewis reported to Gatti that machine operator Trimmer, a veteran member of GBBA (R. 204a), expressed the opinion that, if the IUE buttons continued to be worn, "somebody is going to get a bar shoved through their stomach" (R. 306a; 185a-186a). On August 10 or 11, Hot End Superintendent Marcus Clark reported to Ross, Gatti's assistant, who was making a routine plant tour (R. 130a), that some operators on one of his foreman's shifts were disturbed by the buttons, and that they might walk off the job or rip the buttons off the employees (R. 308a; 130a-131a). Ross told Clark to report the situation to Plant Manager Gatti. On August 12, Clark advised Gatti that the old-time machine operators in his department "resented very much the fact that some of the shop boys and other people in there were wearing a badge and that they had threatened to rip these badges off," and "that they would not work with anyone who wore one of these badges" (R. 58a-59a). Gatti instructed Clark to tell these employees that they would be discharged if they participated in violence (R. 93a).[3]

Also on August 12, Rogers, Recording Secretary of the Men's Local of GBBA, reported to Gatti that one of the men said that violence and a walkout might occur

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rest as reported by Lewis, who was only an occasional visitor in the plant (R. 56a-57a). Indeed, Gatti, referring to Lewis' report, testified that "I couldn't believe what he was telling me at the time. I was surprised that he came in" (R. 88a).

[3] The same day GBBA officer Lewis received a report that GBBA members in the hot end department were threatening a work stoppage in resentment over the badges. Lewis dissuaded them from walking off (R. 179a-181a).

if the CIO adherents continued to wear their badges (R. 102a-105a). And, on August 13, Personnel Director Anthony reported to Gatti that "cat-calls and loud conversation" occurred, prior to work time, when some employees appeared wearing IUE-CIO buttons (R. 157a-158a). Anthony had approached the group and asked the people wearing the buttons to take them off, but he did not order the persons making the noise to stop the disturbance (R. 170a-171a). He further told the employees that they were not allowed to solicit in the plant (R. 264a, n. 2; 55b, 167a).

The wearing of the IUE buttons did not, in fact, result in any acts of violence in the plant, nor in any walkouts (R. 267a; 93a).[4] And, throughout this entire period, not a single IUE supporter complained that he had been threatened in any way, or that any employee had refused to work with him (R. 96a-97a). As summed up by employee Copley (R. 49a), "they did work with the guys that wore badges and they never tore none off."

Moreover, although the Company instructed its supervisors to warn employees that they would be subject to discharge if they engaged in violence, it did not use

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[4] The only violence possibly associated with the organizational drive consisted of two instances away from the plant. In one incident, employee Leroy Smales struck an IUE supporter who sought to hand Smales' wife a leaflet near the plant gate (R. 164a, 230a). Smales was not disciplined, for, as Personnel Director Anthony stated (R. 165a), "Since the incident occurred not on company property but on the sidewalk and in the street, we did not pursue it any further." The other incident involved employee Oakes whose eye was blackened in an altercation with some IUE supporters about one mile from the plant (R. 245a-246a).

plant-wide publicity or the sanction of top management to acquaint employees with this policy, nor did the Company bring to the attention of the employees the fact that IUE supporters had a right to wear buttons no less than did GBBA supporters, and that the latter were required to respect that right (R. 95a-96a). Finally, during the period the IUE buttons were worn, the Company did not find it necessary to discipline any of the GBBA supporters who threatened violence or work stoppages (R. 309a, n. 9, 310a; 91a, 95a).

Nevertheless, on August 14, the Company posted a bulletin, effective immediately, prohibiting the wearing of any union insignia or badges on Company property at any time. The bulletin stated that "Trouble among our employees has already occurred," and that "This rule is necessary in order to maintain harmonious relations in our plant and to prevent anything of a real serious nature from developing" (R. 275a).[5]

On August 19 and 20, the Company discharged 21 IUE supporters who continued to wear these badges (R. 266a).

B. *The Board's conclusions and order:* The Board (with one member dissenting) held that, on the facts of this case, the Company's ban against the wearing of union buttons violated Section 8(a)(1) of the Act, and its discharge of the 21 employees for wearing the IUE button violated Section 8(a)(3). The Board,

[5] There was already in existence a rule against fighting, which, as shown above, had not been invoked in this period. When Plant Manager Gatti was asked by one of the employees why a new rule was necessary to prevent trouble, he replied that "he would make any rule he deemed necessary in the plant" (R. 22a).

applying the rule laid down in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793, recognized that special circumstances relating to plant discipline or production may warrant depriving employees of their right to wear union insignia, but concluded that no such circumstances existed here (R. 308a-309a). Such special circumstances, the Board stated, require more than, as here, submission to the demands of an incumbent union or its members to prevent adherents of a rival union from exercising their legitimate self-organizational rights. Instead of taking appropriate measures against the employees who threatened violence and warning employees that it would not tolerate work stoppages in breach of the existing collective bargaining contract, as would normally be expected, petitioner took the course of least resistance and adopted the no-badge rule to the detriment of the CIO adherents seeking to exercise their legitimate rights. It is difficult to believe, the Board concluded, that petitioner could not have maintained complete order and efficiency by making clear to employees that it would punish violators of rules against disorder and interruption of production and by directing its managerial powers to that end rather than to banning union insignia (R. 308a, 311a). Moreover, the Board added, the special circumstances which in the interest of maintaining plant production and discipline may warrant a limitation on the employees' exercise of their organizational rights do not include strike threats because the employer does not meet employee demands but are limited to interruptions of production while the employees are at work (R. 310a).

The Board order, in relevant part, requires the Company to cease and desist from discouraging membership in the IUE, from prohibiting the display of union insignia, and from in any other manner interfering with the employees' organizational efforts (R. 314a-315a). Affirmatively, the order requires the Company to rescind its rule which prohibits the wearing of union insignia, to reinstate with back pay the 21 employees who were dismissed by the Company, and to post appropriate notices (R. 315a).

C. *The decision of the court below:* The court below (Pet. App. 1), citing the *Republic Aviation* case, *supra,* and *National Labor Relations Board* v. *Hudson Motor Car Co.,* 128 F. 2d 528 (C.A. 6), sustained, as adequately supported by the record, the Board's finding that petitioner's prohibition of the wearing of union badges was not justified by exceptional circumstances, and enforced in full the Board's order.

ARGUMENT

1. Petitioner agrees (Pet. p. 26) that this case is governed by the principle enunciated by this Court in *Republic Aviation Corporation* v. *National Labor Relations Board,* 324 U.S. 793, *viz.,* that an employee has the right, free from employer interference, to wear union insignia while at work, unless special circumstances make a ban on the insignia necessary in order to maintain production and plant discipline. The sole question presented, then, is whether, on the facts of this case, such special circumstances existed here. Review of this issue, essentially factual in nature, is not

warranted, particularly in view of the concurrent findings of the trial examiner, the Board and the court below.

In any event, the record amply supports the Board's conclusion that petitioner had failed to establish such special circumstances as to justify the ban against otherwise legitimate organizational activity. No violence in the plant or interruption of production resulted from the wearing of the buttons. The sole basis for petitioner's action was the fact that GBBA supporters had threatened to engage in walkouts and acts of violence unless the IUE buttons were banned. Petitioner invoked no disciplinary action against the employees who threatened violence or a work stoppage. The Board found it difficult to believe that matters had reached a point where petitioner "could not have maintained complete order and efficiency by making clear to employees that it would punish violation of rules against disorder and interruption of production and by directing its managerial powers to that end rather than to banning union insignia" (R. 311a). Of course, as the Board recognized, (R. 311a), an employer may not be required to wait for actual violence to occur; but here the record discloses no more than a precipitate "submission to the demands of an incumbent union or its members to prevent adherents of a rival union from exercising their legitimate organizational rights" (R. 308a). If such a demand sufficed to justify a curtailment of those rights, then the union standing to gain from the ban could bring it about merely by threatening strife, and the statutory rights of the rival union and its supporters would

thus be subordinated not to any legitimate employer interests but rather to the will of the incumbent union. The principle enunciated in *Republic Aviation, supra,* does not, we submit, contemplate this kind of an adjustment of competing interests.

Petitioner asserts (Pet. 26-29) that the Board has misapplied the rule of that case by setting up "unreasonable standards" for the proof of "special circumstances". More specifically, petitioner contends that the Board erroneously failed to give decisive weight to such factors as the prior history of wild-cat strikes which tended to establish that the no-strike provision of the collective bargaining agreement was not a deterrent to such action, the threats of violence preceding the adoption of the no-badge rule but not then communicated to the employer, and two actual fist fights between plant employees. The Board properly discounted these factors. Petitioner admittedly was not concerned about the altercation since it took place away from the plant (see n. 4, *supra*, p. 5). The threats of violence which were not communicated to the Company prior to the adoption of the no-badge rule could hardly have entered into its appraisal of the alleged "explosive situation." And finally, there was no compelling reason for concluding, in view of petitioner's failure to assert its contract rights, that the disregard of the no-strike provision on prior occasions necessarily presaged similar work stoppages in connection with the badge dispute, if petitioner had made clear, as it did not, that such breaches of the contract would not be tolerated (R. 309a, n. 10). Moreover, as the Board noted (R. 310a), the considerations of plant efficiency

which under *Republic Aviation* might justify a limitation upon the employees' organizational rights plainly do not include strike threats to compel acceptance of employee demands, but relate to interruption of production while employees are at work.

2. Neither of the two cases cited by petitioner (Pet. 14-22) is in conflict with the holding below. Both cases, like the instant case, involve the question of what constitutes "special circumstances" justifying an employer ban against the wearing of badges or union insignia in a plant. All three cases recognize that under *Republic Aviation* an employer may not impose such a restriction unless special circumstances make it necessary in order to maintain production or plant discipline. "Special circumstances" by their very nature necessarily vary with the facts of the particular case, and the facts in the cited cases differ significantly from those here. In *Caterpillar Tractor Co.* v. *National Labor Relations Board*, 230 F. 2d 357 (C.A. 7), the employer forbade the employees from wearing buttons in the plant carrying the legend "Don't be a Scab." The Seventh Circuit concluded that the term "Scab" was inherently provocative and that the employer was therefore justified, without more, in anticipating that the wearing of the insignia in the plant would prove disruptive of production and plant discipline.[6] Here, on the other hand, the button worn by

[6] The court carefully pointed out that its decision was not to be taken as permitting "restriction of passive inoffensive advertisement of organizational aims and interests, i.e., the wearing of advertising insignia and buttons, which in no way interferes with discipline or efficient production." 230 F. 2d at 359.

the IUE supporters was in itself inoffensive and on the facts found by the Board, and upheld by the court below, there was no basis for concluding that considerations of plant efficiency and discipline made it necessary to prohibit its display in the plant.

Similarly, the facts of *Boeing Airplane Company* v. *National Labor Relations Board*, 217 F. 2d 369 (C.A. 9), are distinguishable from those here. There, in the court's view, the situation was so "highly explosive" because of "a violent strike" and other surrounding circumstances that the "wearing of the streamers and shop buttons must be viewed as the spark which might in a second set everything afire again." Accordingly, the court concluded that the employer could properly suspend, for three days, an employee wearing a union "streamer." No comparable background existed here.[7]

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[7] *National Labor Relations Board* v. *Babcock & Wilcox Company*, 351 U.S. 105, also relied on by petitioner (Pet. 22), deals with an entirely different issue and has no relevance here.

CONCLUSION

The decision below presents no substantial question warranting review and is not in conflict with decisions of any other court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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